IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.933 OF 1998

Gajanan Gandhar Naravane
since deceased by his LRs.
Mrs.Nalini Gajanan Naravane & ors. .... Appellants.
Versus.
Pandurang Timble .... Respondent.

Shri V.S.Gokhale for the Appellants.

CORAM : ABHAY S. OKA, J.

DATED : 17th January, 2005.

P.C.:

1. The Appellants have taken exception to the judgment and order dated 16th January 1996 passed by the learned Judge of the City Civil Court, Mumbai. By the said order the learned Judge declined to grant leave to take out Chamber Summons to the Appellants. The order also records that the Chamber Summons shall be registered and it is ordered to stand disposed of and consequently suit stands abated.

2. The Appellants are claiming to be the legal representatives of the original Plaintiff. The original Plaintiff expired on 28th February 1986. The Chamber Summons No.53 of 1996 was taken out by the Appellants for condonation of delay, for setting aside abatement and for bringing their names on record of the suit as legal representatives of the deceased Plaintiff. In the affidavit-in-support filed along with the Chamber

Summons, a case was made out by the Appellants that they were not aware that late Plaintiff had filed Summary Suit in the City Civil Court. They became aware about the same when they received Notice dated 9th November 1995 in the name of the deceased Plaintiff sent by the Registrar of the City Civil Court stating therein that the suit was fixed on 15th November 1995. Thereafter the Appellants immediately contacted their Advocate. On 15th November 1995 a request was made to the trial Court to grant adjournment to enable the Appellants to take out Chamber Summons. Accordingly the Chamber Summons was taken out.

3. The learned trial Judge has held that it was not possible for him to believe that the Appellants were not aware about the pending litigation.

4. Shri Gokhale for the Appellants submitted that a categorical statement on oath was made by the Appellants that they were not aware about the suit filed by the original Plaintiff till they received notice from the Registrar of the City Civil Court. There was nothing on record to show that the Appellants were aware about the said fact. He submitted that the said fact was not controverted by the Respondent as no opportunity was granted to the Respondents to file a reply. He submitted that even assuming that there was some unexplained delay, the Chamber Summons could have been allowed by ordering payment of costs.

5. I have considered the submissions of Shri Gokhale. In clause (A) of the operative part of the impugned order, the learned Judge has stated that leave to take out the Chamber Summons is refused and in clause (B) of the operative part, has stated that the Chamber Summons should be registered and should be treated as disposed of. Both the parts are obviously contradictory. The Chamber Summons was for condonation of delay and to set aside the abatement. Without hearing the Chamber Summons on merits, there was no warrant for coming to the conclusion that the Appellants must be aware about the pending suit. It is settled position that in the matters of condonation of delay and of setting aside abatement of suit, the Courts are required to adopt a liberal approach. Such a liberal approach is not reflected in the impugned order. In my view the Chamber Summons should have been ordered to be registered and disposed of after giving an opportunity to the Respondent to contest the matter.

6. Hence the Appeal deserves to be allowed. The Chamber Summons must be treated as registered and should be heard and decided after notice to the other side.

Hence the following order is passed:

(i) The impugned order dated 16th January 1996 is quashed and set aside.

(ii) Leave to take out Chamber Summonsis granted. The Chamber Summons shall be registered. The learned trial Judge after notice to the Respondent shall hear and decide the Chamber Summons in accordance with law.

(iii) Since the Chamber Summons was taken out in 1996, the learned trial Judge is directed to decide the Chamber Summons as expeditiously as possible.

(iv) All contentions on merits are kept open.

(v) The parties and the trial Court to act on authenticated copy of the order.

Judge.